Supreme Court, U. S.
FILED
OCT 27 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-476

FLORIDA POWER & LIGHT COMPANY, *Petitioner*,

v.

GAINESVILLE UTILITIES DEPARTMENT AND CITY OF GAINESVILLE, FLORIDA, *Respondents*.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JOHN E. MATHEWS, JR.
MATHEWS, OSBORNE, EHRLICH, McNATT, GOBELMAN & COBB
1500 American Heritage Life Bldg.
Jacksonville, Florida 32202

DANIEL M. GRIBBON
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner

TABLE OF AUTHORITIES

Page

CASES:

Lavender v. *Kurn*, 327 U.S. 645 (1946) 5

Otter Tail Power Co. v. *United States*, 410 U.S. 366 (1973) 1-2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-476

FLORIDA POWER & LIGHT COMPANY, *Petitioner*,

v.

GAINESVILLE UTILITIES DEPARTMENT AND CITY OF GAINESVILLE, FLORIDA, *Respondents*.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

Contrary to respondents' argument, this case squarely presents an opportunity for the Court to examine the continuing significance and implications of its important and far-reaching decision in *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973).

The Court of Appeals in this case declined to accord any weight to the pervasive federal and state regulatory framework within which petitioner and other electric utilities must operate. It specifically ruled that the same antitrust standards apply in the electric power industry as in industries which are subject to no governmental regulation. The court's conclusions were expressly premised upon this Court's decision in *Otter Tail*, in which four members of the Court, with three

Justices dissenting, held that the Federal Power Act does not exclude issues of interconnection from scrutiny under the antitrust laws. (Pet., App. A 15a). Respondents' suggestion that *Otter Tail* has nothing to do with this case—which also arises as a result of requests for interconnection—is untenable.

In the specific circumstances of this case, two principal issues are presented as to the relevance of the pervasive regulatory structure created by Congress and the states for the electric power industry: Is that structure to be totally ignored in determining whether two neighboring electric utilities, in response to essentially the same economic and regulatory considerations, have merely engaged in parallel but independent conduct or whether instead they have acted pursuant to agreement; and is that structure to be totally ignored in determining the antitrust standards under which the reasonableness of the activities of electric utilities is to be judged? These issues, which were injected into the case by the Court of Appeals and are directly presented by its opinion, are of significance to the entire electric power industry. The opinion below thus offers an opportunity for this Court to give plenary consideration to the proper accommodation of the antitrust laws and the regulatory requirements governing electric utilities, and to reexamine the decision in *Otter Tail*, which represents the views of less than a majority of this Court.

II.

Petitioner agrees, as respondents point out, that this Court does not sit merely to evaluate the evidence in particular cases. It is, however, entirely appropriate for the Court to consider whether the court below disregarded established principles governing the respect

due jury verdicts and to confirm the proper limits of appellate review of such verdicts. Such consideration can be given only in the context of a case such as this one.

The Court of Appeals here rejected the jury's special verdict, rendered after a two-month trial on the basis of instructions that were "a model of perfection" (Pet., App. A 2a n.3), that there was no wholesale service agreement between petitioner and Florida Power Corporation. The court also rejected the denial by an experienced trial judge of judgment n.o.v., and concluded that the jury was "compel[led]" to find such an unlawful agreement. (Pet., App. A 2a).

In determining that the jury and the trial judge erred in their evaluation of the evidence, the Court of Appeals relied almost exclusively on its assessment of a limited number of documents in the trial record. There is no indication in the Court of Appeals' opinion that it gave any consideration to the extensive testimony in the record regarding those documents, which showed that petitioner's conduct resulted not from any agreement but rather from its own evaluation of pertinent business considerations. That testimony obviously was accepted by the jury, and presumably formed the basis of the trial court's rejection of judgment n.o.v. Nor is there any indication that the Court of Appeals gave any weight to important issues of credibility that the trial judge recognized were presented by the testimony heard by the jury.[1]

---

[1] The trial judge's sidebar comments regarding the credibility of respondents' witnesses encompassed one of the authors of the correspondence relied upon by the Court of Appeals. (*See* Pet. 6-7; App. A 4a-7a). Respondents are thus in error in asserting (Br. 6) that the credibility of this witness did not bear upon the territorial allocation issue that was resolved by the jury in petitioner's favor.

The Court of Appeals usurped the functions of the jury in this case. In rejecting the jury's verdict, the court engaged in its own assessment of the evidence and resolved disputed factual issues. This Court should review the Court of Appeals' decision in order to re-establish that an appellate court may overturn a jury verdict "only when there is a complete absence of probative facts to support the conclusion reached . . .," *Lavender* v. *Kurn,* 327 U.S. 645, 653 (1946), a standard plainly not met in this case.

* * *

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN E. MATHEWS, JR.
MATHEWS, OSBORNE, EHRLICH, McNATT, GOBELMAN & COBB
1500 American Heritage Life Bldg.
Jacksonville, Florida 32202

DANIEL M. GRIBBON
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner

October, 1978